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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

FILED SEPTEMBER 1, 1945

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1 In United States Circuit Court of Appeals, Tenth Circuit

3152

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA, RESPONDENT

On Application for Leave to File Petition for Writ of Mandamus

Certificate of question of law

In the above-entitled cause a certain question of law has arisen on the record upon which this court desires the instructions of the Supreme Court of the United States for the proper decision of such cause.

Statement

Peter Micco died intestate, May 26, 1942. On that day Howard Cummings filed his petition in the County Court of Okfuskee County, Oklahoma, praying that L. F. Merrell be appointed administrator of the estate of Micco, deceased. On June 4, 1942,
2 the County Court of Okfuskee County, Oklahoma, entered its order appointing L. F. Merrell, E. F. O'Neal, and Perry Chisholm co-administrators of the estate of Micco, deceased.

On June 4, 1942, M. S. Robertson, United States Probate Attorney, pursuant to the provisions of the Act of Congress of April 12, 1926 (44 Stat. 239), caused written notice of the pendency of such probate proceeding to be served upon the Superintendent of the Five Civilized Tribes.

On June 19, 1942, the United States filed its petition for an order of removal under the Act of April 12, 1926. In its petition, the United States alleged that the proceeding was instituted to obtain the appointment of an administrator for the estate of Micco, deceased, a three-fourths blood Seminole Indian; that a portion of such estate, comprising real and personal property, is restricted under the laws of the United States; that the title to
3 and an interest in restricted land, and the proceeds, rents, income, and profits derived therefrom are involved; that the heirs-at-law of Micco, deceased, are restricted Indians and wards of the United States; and that notice of the pendency of the probate proceeding was served upon the Superintendent of the Five Civilized Tribes, together with a certified copy of all

pleadings on file in such cause, on June 4, 1942. An order of removal was issued on July 2, 1942. A transcript of the proceedings was filed in the United States District Court for the Eastern District of Oklahoma, on July 27, 1942.

On July 17, 1944, the United States filed its complaint in intervention in which it alleged that Micco, deceased, was duly enrolled as a three-fourths blood Seminole Indian opposite Roll No. 1600 of the approved Seminole Rolls, and, as such, was allotted land in the Seminole Nation, for which patents were duly executed delivered, and recorded; that Micco, deceased, was a full-blood Indian, being one-fourth Creek and three-fourths
4 Seminole; that the restricted land of Micco, deceased, produced large sums of money, which were held under the supervision of the Secretary of the Interior, pursuant to the regulations prescribed by him; and that Micco died intestate on May 26, 1942, possessed of such restricted lands and funds.

It further alleged:

"That at the time of the death of the said Peter Micco, he left surviving no wife, father, mother, children nor issue of deceased child; that he left surviving his sister, Haney Micco, who afterwards became Haney Larney; Andy Hulwa, also known as Andy High, who was the sole surviving child of Martha Micco, a pre-deceased sister of Peter Micco, deceased; Serena Spencer, Sallie Little afterwards Larney, Norman Ripley, Juanita Clark and Katie May Clark, all being the surviving children of Serena Micco, a pre-deceased sister of Peter Micco, deceased; that no other sister or brother survived Peter Micco, and no other child of a deceased sister or brother survived the said Peter Micco. That all of said persons specifically named in this paragraph as kin to the said Peter Micco, deceased, are restricted Indians of more than half-blood, and claiming to be Indians of the full-blood. That no court has legally determined the fact of heirship, and
5 that therefore interveners is entitled to the judgment and decree of this court determining who are, or were, the heirs of Peter Micco, deceased, and excluding all unknown persons claiming to be heirs of Peter Micco.

"That on or about November 25, 1942, the said Haney Micco Larney, died, leaving surviving her husband, Ryder Larney, and her minor children, June Larney, Hattie Larney, and Johnnie Lee Larnie, all unenrolled Seminole Indians; that the said Haney Micco Larney devised and bequeathed all of her estate in equal parts in said survivors by will, which was executed and approved in all particulars required by law, and has been admitted to probate by the county court having jurisdiction of the settlement of her estate, that subsequent to the death of the said Haney Micco Larney, the said Johnnie Lee Larney died intestate without ever having been married, leaving surviving, his father Ryder Larney,

and his two sisters, June Larney and Hattie Larney, hereinabove named; that no decree of heirship has ever been entered by any court to determine the heirs of the said Johnnie Lee Larney, deceased; that in order to determine who are now entitled to receive the estate of Peter Micco, it is necessary and proper that the judgment of this court shall determine whether or not the Will of the said Haney Micco Larney transferred her interest to
6 the said devisees and legatees hereinabove named, and, if not, to determine who are her heirs, and also who are the heirs of the said Johnnie Lee Larney, and for such purposes it is proper to proceed against all unknown persons claiming to be heirs of Johnnie Lee Larney, deceased."

It prayed that the court determine the heirs of Micco, deceased, the nature of the property of which Micco died seized, whether restricted or unrestricted, and the specific parts thereof which are restricted and subject to the supervision of the Secretary of the Interior.

On August 10, 1942, the three administrators filed their motion to remand the proceeding to the County Court of Okfuskee County, Oklahoma. On March 6, 1945, the United States District Court for the Eastern District of Oklahoma entered an order dismissing the petition in intervention without prejudice and ordering that the proceeding be remanded to the County Court of Okfuskee County, Oklahoma.

On April 28, 1945, the United States filed in this court its application for leave to file a petition for a writ of mandamus
7 and attached thereto a copy of its proposed petition. The petition prays that a writ of mandamus issue out of this court directed to the Judge of the United States District Court for the Eastern District of Oklahoma commanding him to vacate the judgment entered March 6, 1945, dismissing the complaint in intervention and ordering the proceeding remanded to the County Court of Okfuskee County, Oklahoma.

At the hearing on the application for leave to file the petition for the writ, because of the importance of the question presented, this court sat en banc.

The Judges of this court are equally divided on the question of whether the judgment of remand is reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926.

Question

8 (1) May this court, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of the proceeding to the County Court of Okfuskee County, Oklahoma?

Since the judges of this court are equally divided on the two questions presented, we respectfully request the Supreme Court to require the entire record in the cause to be sent up for its consideration and that it decide the whole matter in controversy.

ORIE L. PHILLIPS,
SAM G. BRATTON,
WALTER A. HUXMAN,
ALFRED P. MURRAH,
Judges of the United States Circuit Court of Appeals sitting in said cause.

9 In the United States Circuit Court of Appeals for the Tenth Judicial Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit, do hereby certify that the foregoing is the original signed certificate of questions of law filed and entered of record in said cause on the 4th day of September, 1945, in case No. 3152, United States of America, petitioner, versus Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, respondent.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit at my office in the city of Denver, Colorado, on the 4th day of September, A. D. 1945.

[SEAL] ROBERT B. CARTWRIGHT,
Clerk, United States Circuit Court of Appeals for the Tenth Circuit.

[Endorsement on cover:] Certificate. File No. 50114. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 411. The United States of America vs. Judge Eugene Rice, District Judge for the Eastern District of Oklahoma. Filed September 7, 1945. Term No. 411 O. T. 1945.

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